

Funding AFV Projects Through Air Pollution Penalties Under The SEP Program

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ABSTRACT

AFV programs are receiving increased attention as efforts to reduce emissions concentrate on mobile source emissions. Programs such as Ozone Action programs and Clean Cities efforts are in demand but do not receive a particularly high level of government funding.

These programs could be funded as Supplemental Environmental Projects. A Supplemental Environmental Project is an environmentally beneficial project which a violator voluntarily agrees to perform as part of settlement of an enforcement action. In return, the agency agrees to reduce the monetary penalty that would otherwise apply as a result of the violation. As EPA, state and local agencies file more enforcement actions for larger penalties, the SEP approach can become a significant source of funding for AFV programs.

INTRODUCTION

As efforts to improve air quality focus on individual actions rather than traditional smokestack controls, a number of public and community education efforts have become more important in the field of air pollution control. Clean Cities Programs are now operating in dozens of major metropolitan areas, and more programs will be established if EPA's new ambient air quality standards move forward.

These programs are chronically short of funding, and this presentation describes a method of funding AFV projects through parts of air pollution penalty payments that otherwise would be paid to enforcement agencies. The diversion of penalty payments from government treasuries to programs that benefit the community has been done for years at the federal, state and local levels. They have been called "In Lieuities" because money is spent in lieu of penalties, and also have been called "in kind penalties", "Environmentally Beneficial Projects" or "Bennies", "Community Environmental Projects" (CEPs) or in the federal system, "Supplemental Environmental Projects" or "SEPs".

The legal mechanism for this funding is contained in agency environmental enforcement policies. To use the federal system as an illustration, EPA has published a guidance document called, "EPA Supplemental Environmental Projects Policy" effective May 1, 1998. While the federal practice is used as a pattern by many state and local environmental enforcement agencies, almost every environmental agency that has the power to collect penalties has a comparable policy. These policies apply to any type of settlement - at the agency level as well as actions filed in court.

FEDERAL SUPPLEMENTAL ENVIRONMENTAL PROJECTS

Without getting into too much detail on how the government penalizes violators of environmental laws, the process is described in written penalty policies at the federal, state and many local levels. The policies describe how the penalty is calculated based on factors in the underlying law, such as intent, the impact of the violation, the length of time the violation occurred, and the costs saved as a result of the violation. Once the penalty amount is initially determined, the SEP can be evaluated.

The federal policy describes a SEP as:

“Environmentally beneficial projects which a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform.”

Environmentally Beneficial Projects improve, protect or reduce risks to public health or the environment that primarily benefit the public, not the violator. Usually, the violator proposes the project after the regulator has identified a violation and a penalty. The project cannot include tasks that the violators are likely to be required to perform under environmental laws.

The project should have a “nexus,” or a connection with the environmental law and the community that was affected by the violation. The nexus exists if the project reduces the likelihood of future, similar violations, or reduces the risk to public health or the environment. EPA suggests projects related to public health, pollution prevention and pollution reduction are acceptable SEPs. EPA has approved AFV projects as SEPs under the Public Health and Pollution Prevention Categories. (See attachments A and B).

In the federal system, the SEP payment is not likely to be the entire amount of the proposed penalty. Some states set a specific limit. For example, Pennsylvania will give credit of up to 75% of the total penalty for the amount spent on the SEP. EPA considers the following factors in determining the amount of the penalty that can be spent on the SEP: benefits to the public or environment, innovativeness, environmental justice, community input, multimedia impacts and pollution prevention.

The SEP project is defined in a written settlement agreement covering what, where and when. The agency will not want to be involved in administrative aspects of the SEP, but will require assurance and documentation that the project has been completed. There is a pattern federal settlement agreement that provides form language.

STATE PROGRAMS

While about half of state and local agencies adopt the federal SEP policy, each state can adopt an independent policy. For example, Pennsylvania's "Community Environmental Project" policy is not as long as EPA's, but allows CEPs that have a substantial public health, safety or environmental benefit to the local community or general public. The CEP cannot be something the company is required to do. Pennsylvania will not suggest or force a CEP, but will identify possible projects once the violator raises the idea. Pennsylvania does not allow tax deductions for CEPs. It is probably fair to say that state programs follow the objectives of EPA's program but do not contain quite the level of bureaucratic detail and may be more flexible in terms of what kind of project will be acceptable as a SEP.

HOW TO OBTAIN SEP FUNDING

My experience as an attorney who defends air enforcement actions, participates in a number of public education activities, and has negotiated SEP agreements is that companies prefer to fund SEP projects that have a positive impact in their communities rather than write substantial checks that disappear into government accounts. However, the SEP concept is fairly new and is not widely used. How can you obtain SEP funding?

First, become familiar with the SEP rules as applied in your area. EPA has a SEP homepage, <http://es.epa.gov/oeca/sep>. This Website also has a listing of SEPs approved by EPA from 1996 to 1997. Your state or local agency probably has a similar Supplemental Projects or Community Projects policy. Ask an agency person who works in enforcement for a copy. It will be a public document.

Second, identify possible SEP contributors. Agency enforcement actions are published in news stories, agency press releases, summarized on web sites, and talked about on the grapevine. Notices of Violation are public documents available through the Freedom of Information Act upon request. Not every NOV results in a penalty, but this will provide you a contact list. Nearly every agency now has a community relations staff or individuals who participate in public environmental education. Ask them to help identify contacts, and explain the contribution of the SEP within the agency once the SEP is proposed. Since the SEP is voluntary, I think Pennsylvania's practice of not suggesting or raising the SEP, but helping once the violator suggests it, is a good one.

Third, contact the potential contributor. Explain the public and community benefit of the SEP. Show them the SEP policy - many companies will not be aware of the process. Provide a budget, discuss the result or "deliverable". Make it self implementing to the extent possible. The agency cannot, and the company will probably not want to administer the project. SEPs may or may not be tax deductible (usually penalties cannot be deducted). Companies can publicize their community contributions but may have to disclose it as part of a settlement agreement.

Fourth, plan on selling the value of the SEP to the agency. The factors the agency must evaluate will be in the SEP policy. In every agency there are people who like SEPs and people who don't. Ask your allies to help.

Fifth, plan ahead. The process of negotiating a penalty settlement agreement always takes a long time, and the SEP aspect adds another issue to the negotiations. Multimillion dollar agreements take perhaps a year, and even fairly simple settlements can take six months from agreement in principle to signing the document.

CONCLUSION

Federal and state enforcement efforts allow companies to fund AFV projects as a community benefit and deduct these costs from penalties paid to the government. As more and larger enforcement actions are filed, SEP funding can become an important part of Clean Cities Program budgets.

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